IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MULLEN AUTOMOTIVE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N23C-03-252 SKR CCLD
	)	
INTERSECTION MEDIA GROUP, INC. d/b/a DOT.LA, and DAVID SHULTZ,	)	
	)	
Defendants.	)	

OPINION

Mullen Automotive, Inc. ("Mullen") brought this action against Intersection Media Group, Inc. d/b/a dot.LA ("dot.LA") and David Shultz ("Shultz" and collectively with dot.LA, "Defendants") alleging that Defendants published defamatory statements in a March 22, 2023 online news article (the "Article") about the terms of Mullen's settlement of its lawsuit against non-party Qiantu, a Chinese manufacturing company.[1]

Mullen's Complaint brings two causes of action: (i) defamation *per se* for damages caused by the Article, and another claim for an (ii) injunction preventing future defamatory statements and compelling the removal of existing defamatory

[1] Pl.'s Compl. ¶¶ 29-37, Oct. 14, 2022 (D.I. 1) ("Compl.").

content concerning Mullen.[2] Defendants have moved to dismiss Mullen's Complaint under Superior Court Civil Rules 12(b)(1), 12(b)(2) and 12(b)(6).[3]

As discussed below, because Mullen's well-pleaded complaint fails to allege an actionable defamatory statement that was published with actual malice, Defendants' Motion to Dismiss pursuant to 12(b)(6) is hereby **GRANTED**.[4]

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff Mullen is a Delaware corporation with its principal place of business in California.[5] Mullen is a publicly traded electric vehicle startup company which has been listed on the NASDAQ exchange since November 5, 2021.[6]

Defendant dot.LA is a Delaware corporation[7] with its principal place of business in California.[8] dot.LA is an online news and events company focused on startup and technology news primarily concerning companies with a Southern

[2] Compl. ¶¶ 40-52.
[3] Defs.' Mot. to Dismiss at 1, Apr. 25, 2023 (D.I. 13).
[4] Because the Court's ruling on Defendants' Motion pursuant to 12(b)(6) is case dispositive, the Court will withhold ruling on the asserted 12(b)(1) and 12(b)(2) grounds.
[5] Compl. ¶ 1.
[6] Compl. ¶ 1.
[7] Compl. ¶ 2.
[8] Affidavit of Sam Adams ¶ 5, Apr. 25, 2023 (D.I. 13) ("Adams Aff.").

California presence.[9] Defendant Shultz is a resident of California.[10] He works from home as a reporter for dot.LA, covering the electronic vehicle industry since 2021.[11]

B. THE STATEMENTS

Mullen contends that the Article written by Shultz and published by dot.LA[12] contains several defamatory statements (the "Statements"), categorized into three groupings:

Settlement Statements

- (Headline) Mullen Automotive Pays Nearly $20 Million to Settle Lawsuit with Qiantu
- Under the terms of the [settlement] agreement, Mullen will pay Qiantu $6 million, plus warrants that allow the purchase of up to 75 million shares of MULN stock starting in September 2023. MULN is trading at a whopping $0.14 per share today, meaning that adds another $10.5 million to the pot at today's price. … [T]he math adds up to nearly $20 million that Mullen will have to pay out, not including royalties.

K-50 Statement

- Mullen will still need to make sure the K-50 complies with the standards and regulations in the United States—a process that is often incredibly expensive and time consuming. So far, it's unclear how Mullen, a company that has never manufactured a production vehicle before, will tackle that challenge.

Insolvency Statement

- With how ragged things look from the outside, it's hard to even predict if Mullen will exist come September.

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[9] Affidavit of David Perez ¶¶ 6-18, Apr. 25, 2023 (D.I. 13) ("Perez Aff.").
[10] Affidavit of David Shultz ¶ 2, Apr. 25, 2023 (D.I. 13) ("Shultz Aff.").
[11] Shultz Aff. at ¶¶ 2-8.
[12] Ex. A to Shultz Aff., Apr. 25, 2023 (D.I. 13) ("Article").

C. CORRECTIONS TO THE ARTICLE

The Article was published on March 22, 2023 at 8:05 a.m. EST.[13] Later that day, Mullen sent dot.LA a cease-and-desist letter demanding retraction of the Article's false statements.[14] On March 23, 2023,[15] dot.LA published a modified version of the Article (the "Modified Article"), back-dated to March 22, 2023, which revised the Settlement Statements (the "Revised Statements"), but did not alter the K-50 or Insolvency Statements.[16] The text of the Revised Statements is as follows:

> <u>Revised Statements</u>
>
> - (Headline) Mullen Automotive Pays Millions to Settle Lawsuit with Qiantu
> - Under the terms of the [settlement] agreement, Mullen will pay Qiantu $6 million, plus warrants that allow the purchase of up to 75 million shares of MULN at 110% of the price of the common stock. These warrants are exercisable for one year, starting in September 2023. ... [T]he math adds up to at least $8 million that Mullen will have to pay out, not including royalties.

The Modified Article added a comment at the end of the text, which stated, "Update: This story has been corrected to provide a more accurate description of the

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[13] Shultz Aff. ¶ 4.

[14] Pl.'s Answering Brief at 7, Jun. 14, 2023 (D.I. 21) ("Ans. Brief"); Compl. ¶ 31.

[15] Mullen alleges that its first cease-and-desist letter was sent at the "end of the day" on March 22, 2023, and that the Modified Article was not uploaded until sometime on March 23, 2023. This version of events is contradicted by Shultz's Affidavit and Defendants' position that the Modified Article was uploaded on March 22, 2023 at 1:53 p.m. The Court will accept the version of events presented by Mullen, the non-moving party on a motion to dismiss, as true.

[16] Ans. Brief at 7-8; Compl. ¶ 33.

financial terms of the settlement between Qiantu and Mullen."[17] On March 24, 2023, Mullen sent another cease-and-desist letter to dot.LA identifying the Modified Article's continued deficiencies, but Defendants did not respond.[18] To date, the Modified Article remains on dot.LA's website.[19]

D. Affidavits and Exhibits accompanying Defendants' Motion

1. Affidavit of David Perez and Exhibits

David Perez, Esq. ("Perez") is a Washington attorney, admitted *pro hac vice* for dot.LA.[20] In his affidavit, Perez offers his personal knowledge of three exhibits attached to his affidavit and referenced in Defendants' Opening Brief.[21] Exhibit A to Perez's Affidavit is a table from Yahoo! Finance showing Mullen's daily stock price every day from November 5, 2021 until April 20, 2023.[22] Exhibit B is a copy of the 8-K that Mullen filed with the SEC on March 20, 2023. The 8-K describes the terms of Mullen's settlement with Qiantu and was included in the Article via hyperlink.[23] Exhibit C is a copy of Mullen's March 20, 2023 press release discussing

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[17] Ans. Brief at 8; Compl. ¶ 34.
[18] Ans. Brief at 8; Compl. ¶¶ 38-39.
[19] Ans. Brief at 8; Shultz Aff. ¶ 5.
[20] Perez Aff. ¶ 1.
[21] *Id*.
[22] *Id.* at ¶ 2; Ex. A to Perez Aff., Apr. 25, 2023 (D.I. 13) ("Stock Value Data"); https://finance.yahoo.com/quote/MULN/history?period1=1636070400&period2=1682035200&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true.
[23] Perez Aff. ¶ 3; Ex. B to Perez Aff., Apr. 25, 2023 (D.I. 13) ("Form 8-K").

the settlement with Qiantu and included via hyperlink in the Article.[24] In its press release, Mullen describes itself as a Southern California-based automotive company building the next generation of electric vehicles that will be manufactured in its two United States-based assembly plants.[25]

2. Affidavit of Defendant Shultz and Exhibits

In his affidavit, Shultz lists the documents that he relied on to write the Article: "(1) court documents that [Mullen and Qiantu] had filed in the United States District Court for the Southern District of California; (2) a press release that Mullen issued on March 20, 2023, about the settlement; and (3) an 8-K that Mullen filed on March 20, 2023, in which Mullen described the settlement."[26] Additionally, Shultz states that he relied on his "personal knowledge of Mullen and the electric vehicle industry, as [he has] been covering Mullen for close to one year and the electric vehicle industry since 2021."[27] Exhibit A to Shultz's affidavit is a copy of the Article as it appeared when first published.[28] Exhibit B is a copy of the Modified Article, as it appeared when published on March 23, 2023.[29]

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[24] Perez Aff. ¶ 4; Ex. C to Perez Aff., Apr. 25, 2023 (D.I. 13) ("Press Release").
[25] Press Release at 20.
[26] Shultz Aff. ¶ 8.
[27] *Id.*
[28] *Id.* at ¶ 4; *see* Article.
[29] Shultz Aff. ¶ 5; Ex. B to Shultz Aff., Apr. 25, 2023 (D.I. 13) ("Modified Article").

II. STANDARD OF REVIEW

When judging a motion to dismiss a complaint for failure to state a claim, made pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true.[30] Delaware is a notice pleading jurisdiction.[31] Thus, for a complaint to survive a motion to dismiss, it need only give "general notice of the claim asserted."[32] The test for sufficiency is a broad one, that is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.[33] If the plaintiff may recover, the motion must be denied.[34] In ruling on a motion to dismiss under Rule 12(b)(6), a trial court must draw all reasonable factual inferences in favor of the party opposing the motion.[35]

Conversely, a Court may grant a motion to dismiss for failure to state a claim if a complaint fails to assert sufficient facts that, if proven, would entitle the plaintiff to relief, i.e., if it fails to plead its claim with "reasonable 'conceivability.' "[36] The Court need not "accept conclusory allegations unsupported by specific facts or ... draw unreasonable inferences in favor of the non-moving party."[37]

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[30] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[31] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).
[32] *Id.*
[33] *Spence v. Funk,* 396 A.2d 967, 968 (Del. 1978).
[34] *Id.*
[35] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).
[36] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 n.13 (Del. 2011).
[37] *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011).

In addition to these universal standards of review at the motion to dismiss stage, there are additional considerations unique to defamation suits. It is well understood that "[e]arly dismissal of defamation lawsuits for failure of the complaint to state a claim on which relief can be granted 'not only protects against the costs of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive.' "[38] Accordingly, there is a "high bar to clear to establish defamation", especially for claims against the free press by a public figure or entity.[39]

III. PARTIES' CONTENTIONS

First, Defendants assert that the defamation claim fails because none of the Statements identified in the Complaint are actionable defamatory statements.[40] Defendants contend that the K-50 and Insolvency Statements are protected expressions of opinion under the Free Speech Clause of the First Amendment. And, the Settlement Statements are not actionable, Defendants argue, because they are substantially true.

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[38] *ShotSpotter Inc. v. VICE Media, LLC*, 2022 WL 2373418, *6 (Del. Super. Jun. 30, 2022) (internal citations omitted) ("*ShotSpotter*"). "The First Amendment guarantees freedom of speech and freedom of the press. Costly and time-consuming defamation litigation can threaten those essential freedoms. To preserve First Amendment freedoms ... the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Id.* (citing *Kahl v. Bureau of Natl. Affairs, Inc.,* 856 F.3d 106, 109 (D.C. Cir. 2017)).

[39] *See ShotSpotter*, 2022 WL 2373418, *6-8.

[40] Defs.' Opening Brief at 14, Apr. 25, 2023 (D.I. 13) ("Opening Brief").

Mullen responds that the Statements are all false expressions of fact because the Settlement Statements portray Mullen as being susceptible to financial ruin, the K-50 Statement accuses Mullen of lacking financial resources and technological capability, and the Insolvency Statement insinuates Mullen's impending insolvency.[41] Together, Mullen contends, "[s]uch statements maligning Mullen's business clearly would (and did) harm Mullen's reputation 'in the estimation of the community,' as reflected by Mullen's sudden stock price drop."[42]

Second, Defendants posit that Mullen failed to plead any facts establishing that a third party would understand the defamatory character of the statements.[43] Mullen counters that under Delaware law, statements which question the integrity of a plaintiff's business operations can be regarded as understood by third parties to be defamatory. Mullen points to an allegation in the Complaint that the statements are "not merely opinion, and were understood by people who saw and read them to be statements of fact about Mullen and its business."[44] Mullen also offers the drop in its stock price on the date the Article was published and the following day as evidence that the statements defamed Mullen in the community.[45]

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[41] Ans. Brief at 11.
[42] *Id.*
[43] Opening Brief at 14-15.
[44] Ans. Brief at 17.
[45] Ans. Brief at 11.

Third, Defendants argue that Mullen failed to plead any facts that the Statements were published with actual malice.[46] Mullen retorts that actual malice is supported by the statement in Shultz's affidavit that he relied on certain documents, which, Mullen contends, should have proven the falsity of his statements.[47] Additionally, Mullen asserts that actual malice can be inferred from the Defendants' failure to adequately correct the Article, despite its cease-and-desist letters.[48]

The Court will address each of these arguments below.

IV. ANALYSIS

A. SCOPE OF REVIEW

There are three instances where a trial court can look beyond a complaint on a motion to dismiss: (1) when a document is integral to a claim and incorporated into a complaint; (2) when the document is not being relied upon to prove the truth of its contents; or (3) when the document is an adjudicative fact subject to judicial notice.[49]

Here, the parties agree that the Court may consider the Article, and the documents that it includes via hyperlink, because they are incorporated into the Complaint.[50] However, Mullen argues that the Yahoo! Finance stock value data is

[46] Opening Brief at 14-15.
[47] Ans. Brief at 18-19 (citing Shultz Aff. at ¶ 8).
[48] Ans. Brief at 19 (citing Compl. at ¶ 31).
[49] *ShotSpotter* 2022 WL 2373418, *4 (internal citations omitted).
[50] Defendants supply the documents as exhibits to their Motion, and Mullen relies on the discrepancies between the Article and the documents cited by Shultz to allege actual malice. *See* Ans. Brief at 13.

improper at this stage and "invite[s] conversion of [Defendants'] Motion into one for summary judgment.[51] Defendants argue that the Court should take judicial notice of the stock value data because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[52]

The Court will consider the stock value data for two reasons: 1) the value of Mullen's stock affects the value of the settlement, which the Court will necessarily consider in determining whether the Settlement Statements are substantially true or false, and 2) the data is capable of verification by unquestionable sources.[53] The Court will not consider the other news articles which Defendants reference in their opening brief because they do not fall under one of the three exceptions to the exclusion of extrinsic evidence at the motion to dismiss stage.

B. FAILURE TO STATE A VALID CLAIM FOR DEFAMATION

In a public figure defamation case, like the case at bar,[54] a plaintiff states a claim by pleading: 1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published; 4) a third party would understand the

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[51] Ans. Brief at 14.
[52] Opening Brief at 4 n.1; *ShotSpotter*, 2022 WL 2373418, *3.
[53] *See, e.g., In re Vaxart, Inc. Stockholder Litig*., 2021 WL 5858696, at *5 n.54 (Del. Ch. Nov. 30, 2021) (taking judicial notice of reported stock prices).
[54] Mullen does not dispute its status as a public figure and requirement to allege falsity and actual malice. *See, generally*, Ans. Brief.

character of the communication as defamatory; 5) the statement is false; and 6) the defendant made the statement with actual malice.[55]

Here, the second and third elements are not in dispute because Defendants acknowledge that they published the Article concerning Mullen.[56] The remaining elements are disputed. In the discussion below, the Court will first consider whether each of the Statements, and the Article as a whole, meet the several requirements of an actionable defamatory statement. The Court will then consider whether Mullen adequately pleaded that Defendants published the statements with actual malice.

1. Mullen Fails to Allege an Actionable Statement

Whether a statement "can reasonably be interpreted as communicating actionable defamatory facts about an [entity] is a question of law."[57] This question is appropriately considered and determined under a motion to dismiss standard.[58] In answering this question, the Court must determine whether the alleged statements (1) are expressions of fact or protected expressions of opinion and (2) whether the challenged statements are capable of a defamatory meaning.[59]

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[55] *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005).
[56] *See* Shultz Aff. ¶¶ 1, 4.
[57] *Cousins v. Goodier*, 283 A.3d 1140, 1147 (Del. 2022) ("*Cousins*").
[58] *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005) ("[The Court] … can determine whether [the statements] are defamatory based on the words and the context in which they were published").
[59] *Id.*

Under the first prong, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."[60] However, "statements on matters of public concern that may be labeled 'opinion' are not categorically shielded from actionability."[61] A statement of opinion may still be actionable if it is reasonably interpreted as stating or implying defamatory facts about an individual that are provably false.[62] Therefore, unless the statement "cannot reasonably be interpreted as stating actual facts about [the plaintiff],"[63] the analysis proceeds to the second prong.

To support a claim for defamation, the alleged factual statement must be both defamatory and false.[64] A statement is defamatory when it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[65] A statement is not defamatory simply because it is critical or disparaging of the plaintiff.[66] The Court must find

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[60] *Cousins*, 283 A.3d at 1155.
[61] *Id.* at 1148.
[62] *Id.*
[63] *Id.* at 1154 (quoting *Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 17-18 (1990)).
[64] *See Riley v. Moyed,* 529 A.2d 248, 253-254 (Del. 1987) ("*Riley*").
[65] *Cousins*, 283 A.3d at 1148.
[66] *Riley*, 529 A.2d at 253 ("Statements which are critical of a plaintiff and disparage his performance but do not lower him in the estimation of the community or deter third persons from associating or dealing with him, nor injure his reputation in the popular sense, are not defamatory").

that a person of average intelligence and perception would understand the plain and natural meaning of the words as defamatory.[67]

In addition, there is no liability under Delaware law for defamation when a statement is substantially true.[68] To decide substantial truth, courts consider whether the "gist" or "sting" of the statement is true.[69] The gist is true if the statement "produces the same effect on the mind of the recipient which the precise truth would have produced."[70] The Court will now address each category of Statements, and the Article as a whole, in turn.

i. <u>The Settlement Statements are substantially true.</u>

That the Settlement Statements are expressions of fact, rather than opinion, is not disputed here.[71] Therefore, the inquiry advances to the second prong to determine whether they convey a defamatory meaning, as well as whether they are substantially true.[72]

The "gist" or "sting" of the Settlement Statements is two-fold: (1) Mullen's business practices were either incompetent or wrongful, and (2) Mullen suffered a crippling financial loss. Under the true terms of the settlement, Mullen is obligated

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Defendants challenge the Settlement Statements only on the grounds of falsity and actual malice. *See* Opening Brief at 21-25.
[72] *See, generally, Riley*, 529 A.2d at 253-254.

to pay Qiantu $8 million, to issue warrants allowing the purchase of up to 75 million shares of common stock at 110% market value until September 2024, to buy a certain amount of K-50 kits each year for five years, and to pay a $1,200 royalty for every K-50 sold in North America over the next five years.[73]

The Court finds that the true settlement terms produce the same effect on the mind of the reader—that the settlement is unfavorable. And, the unfavorable settlement, in which Mullen must pay millions of dollars to settle its own lawsuit, implies that Mullen's business practices were either inept or wrongful and that they are financially crippled as a result. While it is reasonably conceivable that $20 million produces a more harmful effect than $8 million, that effect is regained by the uncertain and lengthy financial obligations of the true settlement terms. Thus, the Court finds that the settlement statements are substantially true, and therefore non-actionable statements for defamation.

ii. The K-50 and Insolvency Statements are protected opinions.

Both the K-50 Statement and the Insolvency Statements are protected expressions of opinion under the First Amendment, and are therefore not actionable statements. Both statements concern predictions about the future, rather than state objectively verifiable facts. Shultz's statements are categorically expressing an unknown and unknowable future when they state that it was "unclear how Mullen

[73] Form 8-K.

… will tackle [the] challenge" of complying with U.S. regulations, and that it was "hard to even predict if Mullen will exist come September."[74] Statements about the future are not actionable for defamation.[75] Moreover, Shultz expressly stated that his opinions were based on how "things look from the outside". This phrase, among others, suggests that Shultz is not privy to undisclosed facts which would verify his prediction. The K-50 and Insolvency Statements cannot be understood as expressions of verifiable fact, and thus, they do not qualify as defamatory statements upon which Mullen can seek recovery.

iii. The Article as a whole is protected opinion based on disclosed facts.

Mullen asserts that the Article is defamatory because it "question[s] the integrity of Mullen's business operations", which could be understood by a third-party to be defamatory.[76] In the Article, Shultz is openly critical of Mullen. In the first sentence of the Article, Shultz writes, "[l]ike a zombie from the grave, Mullen Automotive's electric sports car grift lives once more."[77] Shultz goes on to describe Mullen as a "bedraggled" company, that looks "ragged" from the outside.[78] These statements make plain that the context of the Article is a presentation of Shultz's subjective interpretation, or theory, that Mullen's business operations lack

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[74] Article at 9.
[75] *Cousins*, 283 A.3d at 1155.
[76] Ans. Brief at 17.
[77] Article at 8.
[78] *Id.*

integrity.[79] Hence, the Article would be understood as Shultz's expression of opinion which is only actionable if it implies the existence of undisclosed defamatory facts about Mullen that are provably false.[80]

Here, the Court finds that Shultz's opinion does not imply defamatory, undisclosed facts about Mullen. Rather, it is an opinion based on disclosed facts. The Article included the following disclosed facts, among others: "that Mullen had signed a contract to buy K-50 “kits” from Qiantu; that Mullen had sued Qiantu for breach of contract; that Mullen had allegedly missed payments under the contract; that Mullen’s stock was trading at [$0.14]; that the parties had settled the suit under the terms described in the [Article]; and that Mullen had never manufactured a production vehicle before."[81] Shultz's opinion was also accompanied by hyperlinks to the sources of the facts disclosed, namely: (1) Mullen's SEC Form 8-K filing describing the terms of the settlement; (2) Mullen’s press release announcing the settlement; (3) a brief filed by Qiantu in the underlying litigation; and (4) a Wikipedia article on the K-50.

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[79] *See Agar v. Judy*, 151 A.3d 456, 486 (Del. Ch. Jan. 19, 2017) (hyperbole understood as not the literal truth); *see also, Riley*, 529 A.2d at 252-253 (finding display of figurative or hyperbolic language leads ordinary readers to refrain from inferring factual content).
[80] *Cousins*, 283 A.3d at 1156-1157.
[81] Reply Brief at 17.

It is obvious that the ordinary reader would understand that the settlement was the basis of Shultz's opinion based on the Article's dedication of the headline, the majority of the text, and the majority of the sources to reporting the Mullen-Qiantu settlement. Moreover, the only reasonable interpretation of Shultz's express disclaimer that his opinions were based on "how things look from the outside" is that he does not possess the information needed to state his opinion as fact.

After careful review of the Article in connection with the documents integrated into the Article via hyperlinks, the Court finds that none of the alleged Statements, taken separately or together, are defamatory as a matter of law. If a statement is not defamatory, the issue of actual malice need not be reached.[82] However, the Court will address the remaining element for the sake of completeness.

2. Mullen Fails to Allege Actual Malice

The element of malice must be proven by clear and convincing evidence.[83] To plead actual malice, Mullen must allege facts which support a finding that Defendants published the Article while entertaining serious doubts as to its truth, thereby showing a reckless disregard for truth or falsity.[84] Defendants must have had a "high degree of awareness" of probable falsity.[85] Inaccuracies themselves

[82] *Riley*, 529 A.2d at 251.
[83] *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).
[84] *ShotSpotter*, 2022 WL 2373418, *12 (internal citations omitted).
[85] *Id.*

"will not demonstrate actual malice in a libel case; 'even a dozen errors' in the Article due to mistakes or bad judgment do not substitute for knowing falsehood or reckless disregard as to falsity."[86]

Here, Mullen's allegations do not properly suggest that Defendants published the Article with a reckless disregard for the truth. Regarding the Settlement Statements, actual malice cannot be inferred from Shultz's inaccuracy in describing the settlement terms. Shultz includes a hyperlink to Mullen's own filing, evidencing that he wants to provide the reader with accurate information. He explains the reasoning that led him to the $20 million figure, which was misguided rather than reckless. And most importantly, Defendants published the Modified Article correcting the inaccuracies within 24-hours, which serves to "negate any inference of reckless disregard of truth or falsity."[87]

If the K-50 and Insolvency Statements were reasonably understood to imply undisclosed defamatory facts, they would be treated as defamation by implication claims, which are subject to a heightened standard for malice.[88] On a defamation by implication claim, the plaintiff must show that the Defendant had a reckless disregard as to the truth of the statement *and* as to the defamatory meaning of the

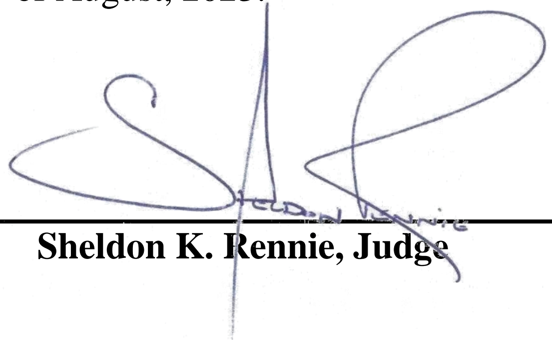
[86] *Id.* at 13 (internal citations omitted).
[87] *Ross v. News-Journal Co.*, 228 A.2d 531, 535 (Del. 1967).
[88] *ShotSpotter*, 2022 WL 2373418, *15.

statement."[89] Here, Mullen presents no allegations susceptible of proof which would support a finding that Shultz possessed a reckless disregard for the defamatory meanings of the statements.

V. CONCLUSION

Mullen's Complaint is limited to defamation arising from one or more statements published by Defendants in the Article. Defendant demonstrated that none of the statements in the Article are actionable, either because they are at least substantially true statements, or because they are not capable of defamatory meaning. In addition, Mullen failed to allege facts to support a finding that Defendants acted with actual malice, a necessary element in a public figure defamation claim. Thus, Mullen's Complaint fails to state a valid claim for defamation. Accordingly, the Motion to Dismiss under Rule 12(b)(6) is hereby **GRANTED**.

IT IS SO ORDERED, this first day of August, 2023.



Sheldon K. Rennie, Judge

Original to Prothonotary

Cc: David Perez, Esq., *pro hac vice*, Perkins Coie LLP, Seattle, WA
Carla Jones, Esq., David Moore, Esq., Potter Anderson & Corroon LLP
Ethan Townsend, Esq., Ryan Konstanzer, Esq., McDermott Will & Emery

[89] *Id.* (citing *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 90 (3d Cir. 2013)).